Supreme Court, U.S.
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No. 00-1261

In The

# Supreme Court of the United States

WILLIAM AND CATHERINE HOOKS, INDIVIDUALLY AND AS PARENTS AND NATURAL GUARDIANS OF CHRISTOPHER HOOKS, A MINOR,

*Petitioners,*

v.

CLARK COUNTY SCHOOL DISTRICT AND BRIAN CRAM, IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF THE CLARK COUNTY SCHOOL DISTRICT,

*Respondents.*

**On Petition For Writ Of Certiorari To United States Court Of Appeals For The Ninth Circuit**

## OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## I.

## STATEMENT OF THE CASE

Petitioners, William and Catherine Hooks, filed this lawsuit in 1998 for the ostensible purpose of obtaining speech therapy services for their son, Christopher. In filing their suit, they argued that the Individuals with Disabilities Education Act ("IDEA") required the Clark County School District ("CCSD") to provide such services even though they had opted out of Nevada's public school system and were schooling Christopher at home.

Prior to the institution of the lawsuit, the United States Office of Special Education Programs ("OSEP"), the federal agency created to enforce the IDEA, had issued a policy letter which stated that under the IDEA, not all students who opted out of the public school system were entitled to the services provided by the IDEA. OSEP Policy Letter, attached to the Petition as Appendix D, pp. 35A-36A. OSEP further stated that the determination of whether children schooled at home are entitled to receive services was left to the discretion of the States. *Id.*, pp. 37A-38A.

When Petitioners first requested speech therapy services for Christopher in 1996, Nevada law did not equate home schools with private schools. As such, consistent with the OSEP policy, home schooled students were not offered special education services under the IDEA. Nevertheless, in Christopher's case, CCSD suggested to the Hooks family that they approach CCSD's Board of School Trustees and ask that an exception to the regulations be made for Christopher so services could be provided. The CCSD Board of School Trustees had the power to grant

such exceptions upon request. Unfortunately, Petitioners chose not to do so. Instead, they filed this lawsuit.

On October 22, 1998, the United States District Court for the District of Nevada agreed with OSEP's interpretation of the IDEA, ruling that the IDEA did not require CCSD to provide services to children who had opted out of the public school system and who were not enrolled in a state-recognized private school. Petitioners then appealed that decision to the Ninth Circuit Court of Appeals.

During the pendency of the Ninth Circuit appeal, Nevada changed its law regarding the provision of special education to children schooled at home. As a result, CCSD offered special education services to Christopher. To date, however, the Hooks family has failed to seek speech services through the CCSD. The only remaining issue in the case after the change in law was reimbursement for speech services Petitioners allegedly had paid for on their own and their claim for attorney's fees.

After briefing and oral arguments, the Ninth Circuit affirmed the District Court's ruling. Acknowledging the change in Nevada law, however, the Ninth Circuit remanded the case back to the District Court to resolve any remaining issues; that is, prospective speech services. The Ninth Circuit wanted to make sure that CCSD, pursuant to the change in state law, was providing Christopher speech therapy services. The fact is, however, that since the change in Nevada law, Petitioners have never sought such services from the CCSD. As such, Petitioners, on remand, agreed that there were no remaining issues at the District Court level and stipulated to have the case

dismissed. (*See* Order of Dismissal, attached hereto as Appendix 1.)

By filing their Petition for Writ of Certiorari ("Petition"), Petitioners ask this Court to review the decision entered by the Ninth Circuit Court of Appeals on September 21, 2000 (hereinafter referred to as "the Ninth Circuit's Decision"). Petitioners' request for rehearing *en banc* was denied. *See* Ninth Circuit Order, attached to Petition as Appendix B.

Rule 10 of the Supreme Court of the United States provides that "certiorari will be granted only for compelling reasons." Petitioners have failed to articulate any compelling reason for this Court to grant certiorari in this case. Therefore, their Petition should be denied.

## II.

## ARGUMENT

### A. The Ninth Circuit's Decision is Not in Conflict with Congressional Intent.

In arguing that there is a compelling reason for this Court to grant certiorari, Petitioners' first assert that the Ninth Circuit's Decision conflicts with the intent of Congress that "all children" receive special education services under the IDEA. Petition, pp. 12-13. This is, and has always been Petitioners' primary contention; that Congress intended to entitle *all* disabled children with the rights provided by the IDEA. They concede that Congress provided for differing levels of rights to different categories of disabled children (those enrolled in public schools,

those enrolled in private schools by school districts, and those enrolled in private schools voluntarily by their parents) but argue that Congress did not intend for any class of disabled children to be denied all rights. However, Petitioners have yet to cite to a single substantive provision of the IDEA which supports that contention. In fact, there is no substantive provision of the IDEA that supports that position. As a result, Petitioners rely exclusively upon the general provisions, Part A, of the IDEA, and particular Congressional statements made therein to support their assertion.

In their Petition for Writ of Certiorari, Petitioners cite to 20 U.S.C. § 1400(d), which states: "The purposes of this title [is] – (1)(C) to assist the States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities." Petition, pp. 12-13. In their argument to the Court of Appeals, Petitioners relied upon similar statements contained in other subsections of 20 U.S.C. § 1400. Addressing the argument, the Ninth Circuit made clear the flaw in Petitioners' contention regarding Congressional intent. Congress did not intend that *all* disabled children would be serviced under the IDEA. Congress merely required States receiving federal funds to *provide*; that is, offer, IDEA services to all children with disabilities. The Ninth Circuit Court stated:

> The appellants rely on Congressional findings contained within the IDEA, providing that "state and local educational agencies have a responsibility to provide education for all children with disabilities." 20 U.S.C. § 1400(b)(8) (1996); *accord* 20 U.S.C. § 1400(c)(6) (2000). The

> school district has not failed in its "responsibility to provide *education* for" Christopher, *id.* (emphasis added); indeed, the school district has offered free enrollment in the public school, replete with subsidized special services. *Cf. Irving Independent School Dist. v. Tatro*, 468 U.S. 883, 890, 82 L.Ed.2d 664, 104 S.Ct. 3371 (1984) (By enacting the IDEA, "Congress sought primarily to make public education available to handicapped children and to make access meaningful.") (internal quotation marks and citation omitted). Nothing in the IDEA requires that school districts provide services to children whose parents have rejected the State's offer of an education and have failed to enroll in any "school," under the State's definition of that word.

Ninth Circuit Decision, attached to the Petition as Appendix A, p. 9A.

The fact that CCSD offered Christopher an education, indeed a "free appropriate public education" under the IDEA, has never been disputed. In fact, even though the Hooks had chosen to school Christopher at home, thereby making him exempt from special education services under Nevada law, CCSD still suggested that they seek relief from CCSD's Board of School Trustees. *See*, Ninth Circuit Decision, attached to the Petition as Appendix A, p. 3A. Therefore, not only did CCSD *provide* (offer) Christopher a free appropriate public education, it also intimated that despite the effect of Nevada law which provided that federal funds are not to be used to service home-schooled children, CCSD was likely to provide the services by operation of an internal policy decision of its

governing body. But the Hooks family refused to even attempt to seek that relief.

Petitioners' conduct in this regard begs the question of the real purpose of this case. One would assume that if indeed the primary concern of Petitioners was speech therapy services for Christopher, they would have explored every option and exhausted every opportunity available to obtain that result. The fact that they intentionally chose not to even pursue the remedy offered by CCSD cannot be ignored as an indication that a much different goal is sought in this case. In fact, even though Nevada's law now provides for special education services for children schooled at home, and CCSD has advised Petitioners that Christopher is now entitled to speech therapy services, they have still failed to seek the services which are now available. What is apparent from these facts is that this case has never been about Christopher's speech therapy services. This case is, and has always been, an attempt to get a federal court to rule that home-schooled students are entitled, without exception, to the rights and privileges granted by the IDEA. And Petitioners and their counsel, the Home School Legal Defense Association, continue to pursue that goal, despite the fact that the issue is now moot in Nevada and with regard to Christopher. In short, Petitioners seek an advisory opinion from this Court which they can use in other states. Obviously, this Court should deny the Petition on this basis alone.

Petitioners' assertion that the IDEA entitles all disabled children to federally funded special education services regardless of the type of schooling environment their parents choose for them is simply not supported by

the language of the law. As acknowledged by Petitioners, Congress explicitly provided for different levels of entitlements depending upon the type of school the disabled child attends. And as the Ninth Circuit noted, Congress also explicitly left to the discretion of the States the determination of what constitutes a school.

> Third, Congress explicitly ratified OSEP's view that States must define the ambit of "private schools." Specifically, the amended IDEA provides *inter alia* that "the term 'elementary school' means a nonprofit institutional day or residential school that provides elementary education, *as determined under State law*." 20 U.S.C. § 1401(5) (2000) (emphasis added). Elsewhere, the new IDEA's definition of "secondary school" is likewise committed to "State law." 20 U.S.C. § 1401(23) (2000).

Ninth Circuit's Decision, attached to the Petition as Appendix A, pp. 8A-9A.

**B. The Ninth Circuit's Decision is Not in Conflict with Any Relevant Decisions of this Court.**

Petitioners contend that there is a compelling reason for this Court to grant certiorari because the Ninth Circuit's Decision conflicts with relevant decisions of this Court. This is simply not true. Some of the decisions cited by Petitioners do not even deal specifically with education, and the ones that do clearly address a different issue.

First, Petitioners argue that the Ninth Circuit's holding that "Nevada and its school districts have a legitimate

interest in promoting educational environments that fulfill those qualifications that the State deems important," and that "[l]imiting IDEA services to qualified 'private schools' reasonably advances that interest by steering scarce educational resources toward those qualified educational environments" cannot be reconciled with this Court's ruling in *Florence County Sch. Dist. Four v. Carter by and through Carter*, 510 U.S. 7 (1993).

Apparently, Petitioners are attempting to argue that *Carter* proclaimed it unlawful to condition IDEA services upon "qualification" of the educational environment by the State. *Carter* made no such proclamation. *Carter* dealt with the narrow issue of whether a school district should be liable for reimbursing parents for private school tuition when it had failed to offer the student a free appropriate public education. *Id.*, 510 U.S. at 9, 13. The school district argued that it should not be required to reimburse the parents because the private school they chose was not "qualified" by the State. The *Carter* Court dismissed the argument, holding that the parents are entitled to reimbursement as long as it is determined that the public placement violated the IDEA and that the private education was proper under the IDEA. *Id.* at 15. The important distinction in *Carter*, however, is that the school district had failed to *provide* a free appropriate public education. The issue, therefore, was the propriety of the parents' response to that failure. It was a completely different question, and a completely different standard. As stated, there is no dispute that CCSD offered Christopher a free appropriate public education.

Petitioners next assert that this Court's ruling in *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993),

cannot be reconciled with the Ninth Circuit's Decision. They assert that in *Zobrest*, this Court "refused to allow any group of children, such as religious children, to be excluded from special education services." The key word in that assertion is "religious." *Zobrest* decided a question involving the interplay between the IDEA and the Establishment Clause of the First Amendment. The question the Court answered was whether providing special education services at a sectarian institution would violate the Establishment Clause. *Id.*, 509 U.S. at 3, 14. Whether children who attended the particular school at issue in that case were *entitled* to services under the IDEA was never disputed. They were so entitled. The real question in *Zobrest* was whether providing services at that location would unconstitutionally entangle the Church and the State.

Petitioners argue that the *Zobrest* Court held that "[i]t is constitutional to provide federally funded special education services to handicapped children, regardless of the schools they may attend." That may be overstating the ruling, since the Court only dealt with sectarian schools, but the assertion is irrelevant to this case. Neither the District Court nor the Ninth Circuit considered the question of whether it would be constitutional to provide services to children in home schools. No one has ever argued otherwise. The issue presented in this case was whether it is *unconstitutional* to *deny* federally funded special education services to certain children who are placed in educational environments that are neither public schools nor state-recognized private schools. *Zobrest* simply did not address that issue.

Petitioners also assert that the Ninth Circuit's Decision conflicts with this Court's decision in *Cedar Rapids Community Sch. Dist. v. Garret F. by Charlene F.*, 526 U.S. 66 (1999). Petitioners assert that *Garret* exemplifies the fact that this Court "has consistently construed IDEA to include handicapped children rather than exclude them." Petition, p. 14. Petitioners also assert that *Garret* confirmed that the purpose of the IDEA is to include all children with disabilities. Petitioner, pp. 14-15.

Petitioners argue that the Ninth Circuit's Decision violates that confirmed purpose. Again, the IDEA was never intended to include *all* children with disabilities. And to argue that *Garret* stands for that proposition is unfounded. As this Court is fully aware, *Garret* addressed the issue of the definition of "related services" under the IDEA; specifically, what services were encompassed within that definition. The critical concern of the *Garret* Court was allowing Garret to stay in *public school*. Garret wanted to attend public school. The school district in question was concerned about the cost required to accomplish that based upon Garret's significant medical needs. The *Garret* Court properly ruled that the school district was required to *make available* a public education, despite the added cost. This ruling was in accordance with the real intent of the IDEA; that is, to *make available* to all children with disabilities a free appropriate *public education*. And more specifically, to *require* school districts to offer such. In the case at bar, it is conceded that CCSD did make such an offer.

Finally, Petitioners argue that this Court, in *Troxel v. Granville*, 530 U.S. 57 (2000), declared the right to direct

the education of their own children a "fundamental" parental right deserving of strict scrutiny when analyzing government interference with that right. *Troxel* involved a state nonparental visitation law which allowed "any person" to petition the court for visitation rights "at any time," and which allowed the court to grant such visitation rights "whenever visitation may serve the best interest of the child." *Troxel*, 530 U.S. at 57. In analyzing this state intrusion upon parental rights, the *Troxel* Court declared that the "Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the *care, custody, and control of their children*." *Id.*, emphasis added. The *Troxel* Court never considered the specific parental right to *direct the education of a child*. The case did not involve education. Rather, the case centered around the most fundamental of parental rights – custody.

To argue that the *Troxel* decision, which dealt with custody and visitation rights, somehow conflicts with the Ninth Circuit's Decision in this case, which dealt specifically with public education funds, ignores this Court's acknowledgment of the State's interest in education, and, therefore, the differing standards applicable to each issue. This Court has held that the States have a legitimate interest in the education of its citizenship, and that that valid interest justifies certain governmental regulations which interfere with the parental right to direct the education of their children. *See, Wisconsin v. Yoder*, 406 U.S. 205 (1972). The standard used by this Court to analyze governmental interference relating to education, including the parental right to direct a child's education, is

clearly different than the standard used to analyze governmental intrusion into other more "fundamental" parental rights, such as custody, as in *Troxel*.

Petitioners' argument that this Court's decision in *Troxel* conflicts with the Ninth Circuit's Decision should be rejected for the same reason that all of the other comparisons to decisions of this Court are flawed. The decisions of this Court cited by Petitioners dealt with different issues. Accordingly, there can be no conflict.

### C. The Ninth Circuit's Decision Does Not Conflict with the Decision of Another Court of Appeals on the Same Important Matter.

Petitioners argue that the Ninth Circuit's Decision conflicts with three decisions by other Courts of Appeal. As with their argument relating to decisions of this Court, this assertion is similarly flawed because all of the Circuit decisions cited by Petitioners dealt with different issues.

First, Petitioners contend that the Ninth Circuit's Decision conflicts with the decision of the Eighth Circuit Court of Appeals in *John T., et al. v. Marion Independent School Dist.*, 173 F.3d 684 (8th Cir. 1999). A simple reading of that decision reveals the *John T.* case was decided upon state law. *Id.*, 687-689. The lower court in *John T.* did not even consider the IDEA claims, and in fact, the Eighth Circuit reversed the lower court's award of attorney's fees under the IDEA because the case was determined solely upon state law. *Id.*, 689-690.

The Eighth Circuit did remand the IDEA claims back to the lower court with specific instructions, but those

instructions in no way conflict with the Ninth Circuit's Decision in this case. *Id.*, 690-691. The *John T.* decision, as it related to the IDEA, dealt with what services were owed to a child who was voluntarily placed by his parents in a private, religious school. *Id.* The discussion centered around the services required by the IDEA prior to and after the 1997 re-authorization. *Id.* But in both instances, the question involved what services were due a child placed in a private, and religious, school. *Id.* The *John T.* court simply did not consider the question determined by the Ninth Circuit in this case. Indeed, the *John T.* issue was not even remotely similar to the issue decided by the Ninth Circuit.

Next, Petitioners cite another Eighth Circuit case, *Peter v. Wedl*, 155 F.3d 992 (8th Cir. 1998). Petitioners argue that "[t]he Eighth Circuit concluded that where a school district denies a student special education services simply because he is enrolled in a private religious school, that school district violates the mandates of the pre-1997 IDEA." Petition, p. 20. Petitioners assert that this decision conflicts with the Ninth Circuit's Decision. This assertion is inaccurate.

The case at bar involves the issue of children placed in an educational environment that is not recognized by state law as either a public or a private school. There is no issue involving religion or the Establishment Clause. In *Peter*, the issue involved placement in a recognized private, but religious school. Indeed, the *Peter* court found that the school district's policy was a "mere pretext for *religious* discrimination." *Peter*, 155 F.3d at 997. To argue that the Ninth Circuit's Decision in this case conflicts with the Eighth Circuit's decision in *Peter* simply ignores

the fact that the two decisions dealt with completely different factual and legal issues.

As a final note, the *Peter* Court did, in *dicta*, discuss the issue of the parental right to direct the education of a child, although in relation to a completely different factual situation. *Id.* at 1001-1002. Even in *dicta*, the *Peter* Court disagreed with the contention of Petitioners herein. The *Peter* Court stated:

> While "the government may not deny a benefit to a person because he exercises a constitutional right," *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 545, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983), the government's "decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny." *Id.* at 549, 103 S.Ct. 1997. Indeed, the Supreme Court has been extremely hesitant to suggest that private school students have a constitutional entitlement to the same benefits that are given to public school students by the government. *See*, e.g., *Norwood v. Harrison*, 413 U.S. 455, 462, 93 S.Ct. 2804, 37 L.Ed.2d 723 (1973) ("In *Pierce*, the Court affirmed the right of private schools to exist and to operate; it said nothing of any supposed right of private or parochial schools to share with public schools in state largesse, on an equal basis or otherwise. It has never been held that if private schools are not given some share of public funds allocated for education that such schools are isolated into a classification violative of the Equal Protection Clause. It is one thing to say that a State may not prohibit the maintenance of private schools and quite another to

> say that such schools must, as a matter of equal protection, receive state aid.").

*Peter*, 155 F.3d at 1002. In any case, as stated, the discussion was *dicta*. ("In light of our remand on other bases, however, we need not reach this issue." *Id.*)

Finally, Petitioners cite to the case of *Fowler v. Unified Sch. Dist. No. 259*, 128 F.3d 1431 (10th Cir. 1997), a Tenth Circuit Court of Appeals case. Again, the *Fowler* case decided a completely different factual and legal scenario than the one presented to the Ninth Circuit in the case at bar. In *Fowler*, the question was what services were required to be provided to a student voluntarily placed in a *private* school. *Id.* at 1433. The question of whether such a student was entitled to services was never in question, only the extent of those services. In contrast, the case at bar addresses the question as to what constitutes a private school under the IDEA and Nevada law, thus entitling the student to services.

As with their previous arguments, Petitioners' attempt to point to conflicts with other Courts of Appeal are completely unfounded. There are no conflicts with decisions of other Courts of Appeal on the same matter.

### D. The Ninth Circuit's Decision Did Not Decide an Important Question of Federal Law That Needs to Be Settled by this Court.

It being clear that there is no compelling reason for this Court to grant certiorari based upon any conflict between the Ninth Circuit's Decision and congressional intent, any decision of this Court or any decision by another Court of Appeals, the last consideration is

whether the Ninth Circuit's Decision "decided an important question of federal law that has not been, *but should be*, settled by this Court." Supreme Court Rule 10, emphasis added.

Petitioners argue that "[t]his Court should take this case because the Ninth Circuit rejected the real interests of the State, as expressed by the Legislature, in favor of the *post hoc* rationalizations of local administrators laboring under the supposed mandates of Washington bureaucrats." Petition, p. 19. This argument is simply without merit. The Ninth Circuit did not reject the real interests of Nevada. The Ninth Circuit specifically affirmed Nevada's interest in carefully expending limited educational funds. The fact that Nevada has since changed its law regarding the provision of special education services to children schooled at home does not mean that the interest no longer exists, or that it was somehow invalid prior to the change in law. True to form, Petitioners impermissibly misconstrue the facts in an attempt to create a conflict.

Petitioners also argue that the Ninth Circuit's Decision will have "far-reaching consequences," arguing that 38 States define home schools separately from private schools. Petition, pp. 20-21. If the issue was really as critical and hotly contested as Petitioners attempt to make it appear, one would assume that there would be a plethora of legal decisions on the matter. But there are not. In fact, counsel has yet to find a single court decision directly on point. Petitioners, and their legal counsel, the Home School Legal Defense Association, want this Court

to believe that the issue requires its immediate attention, but the facts defy that assertion.

## III.

## CONCLUSION

Under any applicable consideration, there is no compelling reason for this Court to grant certiorari in this case. The Ninth Circuit's Decision does not conflict with Congress's intent and purpose in enacting the IDEA, nor does it conflict with any decision of this Court or any other Court of Appeals. And most importantly, the Ninth Circuit's Decision does not decide an important question of federal law that this Court needs to settle at this time. The issue of special education services to children schooled at home is moot in Nevada and as it relates to CCSD as a result of the change in state law. Petitioners are attempting to obtain a federal court ruling favorable to their position for use in those states which still do not equate home schools with private schools. They seek this ruling at the expense of Nevada and CCSD. Such a ruling would be advisory, since Petitioners do not present a current controversy in that regard to the Court through this case. If indeed this issue reappears in one of the other States which still does not equate home schools with private schools for IDEA purposes, as Petitioners assert will occur, then this Court should wait until that case is ripe for review. The fact that the specific issue decided in the case at bar has never been addressed by this Court indicates that it is not the nationally important issue

Petitioners claim, and certainly not an issue that requires this Court's immediate attention.

There is no compelling reason for this Court to grant certiorari. Therefore, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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## APPENDIX 1:
## DISTRICT COURT ORDER DISMISSING CASE

**WILLIAM and CATHERINE HOOKS, individually and as parents and natural guardians of CHRISTOPHER HOOKS, a minor, Plaintiff-Appellants v. CLARK COUNTY SCHOOL DISTRICT and BRIAN CRAM in his official capacity as Superintendent of the Clark County School District, Defendants-Appellees.**

No. 98-17271

UNITED STATES DISTRICT COURT FOR THE FEDERAL DISTRICT OF NEVADA

Date Filed: January 12, 2001

NOT FOR PUBLICATIONS

The letter (#29) from defendant Clark County School District discloses that, notwithstanding this case was remanded by the Circuit, there are no remaining issues to be tried and the matter should be dismissed. Attached to that letter (#29) is the concurrence of plaintiff's counsel.

Accordingly, this action is *DISMISSED* and the Clerk is directed to close this file.

IT IS SO ORDERED.